1989

Debra S. Retherford v. AT&T Communications of the Mountain States, Inc.; Cathy Bateson; Louise Johnson; Vickie Randall : Unknown

Utah Supreme Court

Richard M. Hymas; Nielsen & Senior; Attorney for Respondents.
Richard W. Perkins; Perkins, Schwobe & McLachlan; Attorney for Appellant.

CASE NO. 890464

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * * * * * *

DEBRA S. RETHERFORD, Appellant,	:	
vs.	:	DOCKETING STATEMENT
AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.; CATHY BATESON; LOUISE JOHNSON; VICKIE RANDALL; DOE I THROUGH DOE X, Respondents.	:	(Subject to Assignment to the Court of Appeals) Case No. 890464

* * * * * * * * *

Appellant Debra S. Retherford, pursuant to Rule 9 of the Rules of the Utah Supreme Court, submits the following Docketing Statement in the above-entitled matter.

1. The Utah Supreme Court has jurisdiction to hear this Appeal pursuant to the provisions of 78-2-2(3)(j), Utah Code Annotated (1953, as amended), and Rule 3 of the Rules of the Utah Supreme Court.

2. This is an Appeal from a final Order entered in the Third Judicial District Court in Civil No. 890902183CV, on October 10, 1989.

3. The Order sought to be reviewed was entered on the 10th day of October, 1989, and the Notice of Appeal was filed on October 25, 1989.

4. A true and correct copy of the Order from which this Appeal is taken is attached hereto as Exhibit "A". A true and correct copy of the Notice of Appeal is attached hereto as Exhibit "B".

STATEMENT OF FACTS

5. Appellant was initially employed as a telephone operator by Mountain States Telephone and Telegraph Company in Grant Junction, Colorado, during April, 1976.

6. During February, 1983, pursuant to the nationwide divestiture of AT&T, Appellant transferred to the "Wasatch Office" of AT&T, located in Salt Lake City, Utah, where Appellant continued her employment with AT&T as a telephone operator.

7. Subsequent to Appellant's transfer to the Wasatch Office, Appellant became aware that sexually-offensive comments, jokes and physical contact were common-place at the Wasatch Office.

8. Shortly after Appellant's transfer to the Wasatch Office, Appellant was contacted by her Manager Fayonne Johanneson for the purpose of discussing the employees' Code of Conduct which had been published by AT&T. During such conversation, Appellant was required to sign an entry in her work records indicating that

she had discussed and understood the contents of the Code of Conduct. Such procedure was repeated on a yearly basis, with Appellant discussing said Code of Conduct with whoever was her manager at the time. While certain minor revisions to the Code of Conduct were made from year to year, upon information and belief, the provisions concerning sexual harassment and retaliation, and designating the EEO Coordinator's Office as an appropriate grievance procedure, remained the same throughout Appellant's employment with AT&T. Upon further information and belief, all telephone operators of AT&T were required to review and endorse the Code of Conduct on a yearly basis as a condition of their continued employment with AT&T.

9. During approximately April, 1983, Appellant overheard a male employee of the Wasatch Office state to another male employee words to the effect of, "I'm bisexual, what are you?"

10. During approximately July, 1983, Respondent Johnson was overheard by Appellant and, upon information and belief, by several other employees of the Wasatch Office, loudly describing in explicit detail, a sexual encounter that she had allegedly had with a male employee of the Wasatch Office.

11. Commencing approximately June of 1983, Appellant began to be subjected to unwanted and offensive advances from Jolene Gailey (hereinafter referred to as Gailey), who was at all times material hereto an employee of Defendant AT&T at the Wasatch Office, which included comments by Gailey concerning Appellant's

physical appearance, suggestions that Appellant join Gailey in various activities, and physical touching.

12. At approximately the same time as the commencement of Gailey's conduct toward Appellant referred to in the preceding paragraph, certain other employees of the Wasatch Office, including Respondent Johnson, who were, upon information and belief, personal firends of Gailey, began to congregate around Appellant with regularity. Such employees frequently and regularly conversed explicitly upon subjects of a sexual and/or homosexual nature.

13. On or about November 22, 1984, Gailey, who was visibly intoxicated at the time, sat next to Appellant at work and stated words to the effect of "I'm going to save you from Dave Todd." On this occasion, Gailey placed her hand upon Appellant's arm in an affectionate manner, which greatly offended Appellant.

14. Subsequent to November 22, 1983, the aforementioned pattern of conduct perpetrated upon Appellant by Gailey became more aggressive, to the point where, during approximately December of 1984, Gailey asked Appellant to pose nude while Gailey prepared a picture or sculpture.

15. Shortly following the incident referred to in the preceding paragraph, Gailey, on a separate occasion, told Appellant that she (Gailey) needed to find a roommate, and that she hated men and even the sound of men's voices on the telephone. When

Appellant did not respond to these statements by Gailey, Gailey grabbed Appellant's arm and said words to the effect of, "Debi, why don't you talk to me?"

16. During approximately December, 1983, Appellant was telephoned at her residence by Gailey. Upon information and belief, said telephone call was made by Gailey from the Wasatch Office during her working hours.

17. During approximately January, 1984, a male employee of the Wasatch Office passed a note to Appellant, which note stated that Appellant was having an affair with a certain other male employee. Upon information and belief, Gailey was the originator of the allegation contained within said note.

18. During approximately March, 1984, Gailey telephoned Appellant at Appellant's residence and asked Appellant if she intended to file an EEOC Complaint against Gailey. Such inquiry was made by Gailey, upon information and belief, pursuant to instructions of Respondent Bateson-Hough. Appellant responded to this inquiry of Gailey by stating that Appellant would file an EEOC Complaint if Gailey continued to bother Appellant. Appellant further informed Gailey during this conversation that Appellant had been offended by Gailey's asking Appellant to pose nude. Gailey stated in response to Appellant's comments words to the effect of, "I'm sorry if I offended yo, but I feel I shouldn't apologize for my sexuality."

19. Subsequent to the telephone conversation referred to in the preceding paragraph, Gailey and certain other employees of the Wasatch Office, including the individuals named herein as Respondents, commenced upon a regular practice of retaliatory harassment of Appellant, which included, inter alia, staring at, and making threatening facial expressions at Appellant, walking extremely close to Appellant, following Appellant, and talking about Appellant amongst themselves. On one occasion during approximately March, 1984, Appellant became so upset by this conduct that she was required to leave work early.

20. During approximately March, 1984, Appellant, on two separate occasions, complained verbally to Supervisor Hilda Shelley, and Manager Al Reynolds, concerning the pattern of harassment referred to in the preceding paragraph.

21. On or about May 8, 1984, Gailey assumed a position immediately next to Appellant on the stand-up computer boards at a time when many other positions were available. Appellant immediately moved to another position. Within approximately 10 minutes thereafter, Gailey moved to a different position.

22. On or about May 9, 1984, Appellant wrote and delivered to Bateson-Hough a letter stating that Gailey had continued harassing Appellant in spite of Appellant's requests to Gailey that she not do so.

23. On or about May 10, 1984, appellant submitted a written complaint to the office of the EEO Coordinator for AT&T.

24. On or about May 15, 1984, Appellant received a telephone call at her residence from Richard Salazar, who was at that time, upon information and belief, an employee of AT&T and a Union Steward of CWA. During the ensuing telephone conversation, Salazar stated to Appellant words to the effect of, "You're the new kid on the block -- you're not going to win this. We don't know you very well, but we do know Jolene, she is a respectable person in the community and an artist" and "Somebody could get fired over this."

25. On or about May 31, 1984, at approximately 1:15 a.m., Gailey drove her vehicle at a high rate of speed past Appellant while Appellant was attempting to cross the street to her vehicle. Gailey then proceeded to follow Appellant south on I-15 to the 13th South exit.

26. During June, 1984, the EEO Coordinator's Office for AT&T, per Linda Johnston, who was at that time, upon information and belief, a personal friend of Bateson-Hough, conducted an investigation into Appellant's written complaint filed on or about May 10, 1984. Said investigation, upon information and belief, consisted wholly of personal interviews of Appellant and Gailey, and the submission of written statements by Appellant and Gailey.

27. During approximately June, 1984, Appellant participated in a conversation with Darlene Anderson, who was at that time, upon information and belief, a first-level manager at the Wasatch Office. Said conversation included a discussion of

Appellant's problems with Gailey, in regard to which Anderson stated to Appellant words to the effect of, "Just be careful what you say and do; this is a strong and big group that you are dealing with."

28. On or about July 10, 1984, the EEO Coordinator's Office for AT&T, per Linda Johnston, submitted its report and recommendation in regard to Appellant's written complaint of May 10, 1984. Said report recommended Appellant and Gailey have as little contact with each other as possible in the future.

29. During approximately July, 1984, following the issuance of the report by the EEO Coordinator for AT&T, Appellant received a telephone call from Reta Pehrson, who was, upon information and belief, at that time a supervisor for AT&T and Vice President of Telephone Operators for CWA. During this conversation, Pehrson stated to Plaintiff words to the effect of "You have to be satisfied with the EEO's decision" and "If anybody asks you about it, don't tell them and don't say anything." Pehrson also stated words to the effect of, "Cathy wanted me to also tell you that if you would like a transfer, she will transfer you to the Sundance Office."

30. During approximately July, 1984, Appellant overheard an employee of the Wasatch Office, who was at that time engaged in a conversation with two other employees, including Respondent Johnson, state words to the effect of, "Debi would make a good stripper -- she has big boobs." Immediately following said

statement, Respondent Johnson stated, while looking directly at Appellant, words to the effect of, "My bra size is 34B."

31. Subsequent to the issuance of the EEO Coordinator's report on or about July 10, 1984, Gailey and certain other employees of the Wasatch office, continued to stare at and make hostile facial expressions toward Appellant, to follow Appellant, to walk and sit close to Appellant, and to talk about Appellant amongst themselves. On one occasion during approximately August, 1984, an employee of the Wasatch Office, stated to Appellant words to the effect of, "Debi, they're all staring at you."

32. On or about August 9, 1984, Appellant witnessed a female employee of the Wasatch Office grab Respondent Johnson's crotch from behind. Upon information and belief, Johnson was employed as a supervisor at the Wasatch Office at the time of this incident.

33. On or about August 30, 1984, Appellant filed a charge letter with the EEOC, alleging, in summary, that Appellant had been harassed by some of her co-workers during the preceding year, and that AT&T Management had done nothing to remedy that problem, despite frequent complaints by Appellant.

34. During approximately November, 1984, Appellant received a telephone call at her residence from Alfred A. Aros, who was at that time, upon information and belief, an investigator for the EEOC. During the ensuing telephone conversation, Aros stated to Appellant that three of the four witnesses whom Aros

had interviewed concerning Appellant's allegations of harassment, had indicated that there was a "lesbian problem" at the Wasatch Office. Aros further advised Appellant that he intended to issue a warning to AT&T Management concerning said "lesbian problem".

35. During approximately November of 1984, the Office of the EEO Coordinator for AT&T administered a survey to the employees of the Wasatch Office. On the same day, the Coordinator's Office provided a lecture and film concerning sexual harassment in the work place to the employees of the Wasatch Office.

36. On or about December 29, 1984, Gailey and Respondent Johnson, together with one other employee of the Wasatch Office, engaged in a conversation within hearing of Appellant. During said conversation, Appellant and Gailey made eye contact, whereupon Gailey stated to Appellant words to the effect of "What are you staring at? Will you stop staring at me." Gailey then stated to Johnson words to the effect of, "She keeps staring at me." Johnson then looked directly at Appellant and stated words to the effect of, "She must think we look like dead dogs." Upon information and belief, later that same evening, Gailey stated to Manager Susan Stedman, words to the effect of, "Debi will be upset about what I said."

37. On or about December 30, 1984, Appellant wrote and delivered to Respondent Bateson-Hough a written complaint, in which Appellant set forth the incident described in the preceding paragraph.

38. During January, 1985, Bateson-Hough called Appellant into her office and informed Appellant that Bateson-Hough had forwarded Appellant's written complaint of December 30, 1984, to the EEO Coordinator's Office, and had received from the EEO Coordinator's Office in response thereto, a letter which allegedly reprimanded Appellant for her repeated complaints concerning Gailey. Bateson-Hough then stated to Appellant that Appellant was on warning of dismissal as of that date, said warning to become part of Appellant's permanent employment record, and that if Appellant continued to complain about Gailey, Appellant would be terminated. Bateson-Hough refused to allow Appellant to review the alleged letter from the EEO Coordinator's Office, or to allow Appellant to review her personnel record.

39. On the same day and immediately prior to Appellant's having been placed on warning of dismissal by Bateson-Hough during January of 1985, as referred to within the preceding paragraph, Appellant observed Bateson-Hough and Gailey conversing in a casual manner. Upon noticing Appellant, Gailey made a smug facial expression towards Appellant.

40. Following Appellant's conversation with Bateson-Hough, described in the preceding paragraph, Respondents and other employees of the Wasatch Office, continued to harass and intimidate Appellant by staring at and making hostile facial expressions toward Appellant, by sitting and walking near Appellant, and by talking about Appellant amongst themselves.

41. On February 22, 1985, Appellant filed a civil action in the United States District Court for the State of Utah, Central Division, Civil No. 85-189W, which alleged violations of Title VII and 42 USC Sec. 1983. On June 11, 1985, said Complaint was dismissed by Order of the Court, per Honorable David K. Winder, due to Appellant's failure to respond to AT&T's Motion to Dismiss filed April 9, 1985.

42. During approximately March, 1985, meetings were held by various managers of the Wasatch Office with each of the employees of the Wasatch Office, in groups of two or three employees at a time, for the purpose of discussing the results of the survey which had been taken by the EEO Coordinator's Office during approximately November, 1984. During Appellant's meeting with Manager Fayone Johannason, Appellant was informed by Johannason that the survey had concluded that there was a great deal of discussion about sexual matters, including a prevalence of obscene jokes and remarks at the Wasatch Office. Johannason also indicated on this occasion that employees of the Wasatch Office should bring such incidents to the attention of management, rather than allowing such incidents to remain unreported.

43. Following the issuance of the EEO Coordinator's report on the results of the survey which was administered during November of 1984, incidents of obscene jokes and explicit sexual conversations increased in frequency and offensiveness.

44. During approximately March, 1985, Appellant overheard a conversation wherein Respondent Johnson was speaking loudly with another female employee. During said conversation, Johnson stated to the other employee words to the effect of, "I'm really horny, I'm going to go finger myself." In response to this comment by Johnson, the other employee stated words to the effect of, "If you need any help, I'll be right next door."

45. During approximately March of 1985, Appellant, while working at her station, overheard several employees of the Wasatch Office, including Johnson, discussing in detail their past alleged sexual experiences, including homosexual experiences, and including detailed descriptions of sexual organs and various sexual activities. Said discussion transpired over a period of approximately 30 minutes.

46. During approximately April, 1985, Appellant, acting in her capacity as Union Steward, received several complaints from employees of the Wasatch Office, to the effect that they had seen Respondent Johnson put her hand down the blouse of another female employee during work hours.

47. During approximately May, 1985, Bateson-Hough instituted a policy whereby some computers would be used solely for handling slow calls, while other computers would handle only fast calls. Operators handling the slow computers would inevitably have a lower productivity than other operators. According to

Bateson-Hough's expressed policy, each operator should have spent equal time on the slow computers. However, upon information and belief, Appellant was required to spend far more than an equal share of time on the slow computers, with a consequent drop in productivity.

48. On or about June 16, 1985, Appellant witnessed Respondent Randall approach Respondent Johnson from behind, put her arms around Johnson, and kiss Johnson for a period of approximately 60 seconds. Upon information and belief, Johnson was acting as supervisor of the Wasatch Office at the time of this incident. Later that same evening, Appellant overheard an employee of the Wasatch Office ask Johnson if she (i.e., the other employee) could eat a brownie while she was working on the computer board. (Upon information and belief, eating or drinking while working was contrary to AT&T policy). In response to said request, Johnson stated words to the effect of, "No, because there are some people who will tell on me. Isn't that right, Debi?" This statement was made while Johnson was looking directly at Appellant. Appellant suffered great emotional distress as a result of this incident and was required to leave work early.

49. During approximately July, 1985, Appellant began to make regular visits to Jerry S. Gardner, a psychoanalyst, for the purpose of obtaining treatment for stress and anxiety which Appellant was suffering as a result of the retaliation and harassment to which Appellant was subjected at the Wasatch Office.

50. On or about August 5, 1985, an employee of the Wasatch Office brought a book to work entitled "Joy of Sex". Said book was disseminated and discussed among various employees of the Wasatch Office, including Respondent Johnson, for a period of approximately one week.

51. On or about August 8, 1985, Bateson-Hough, acting as Manager of the Wasatch Office, altered the seating arrangements of Wasatch Office employees, with the result that Appellant would have to sit next to persons who were participating in the retaliatory harassment of Appellant.

52. On or about August 15, 1985, Appellant witnessed two female employees of the Wasatch Office lightly rubbing each other's arms while at work for a period of approximately several minutes.

53. During approximately August, 1985, Appellant obtained a prescription from her physician, Nelson E. Wright, M.D., for Mellaril, for treatment of stress and anxiety that Appellant was experiencing as a result of the harassment to which she had been subjected at the Wasatch Office.

54. On or about August 22, 1985, Gailey moved to a position directly in front of Appellant and stated to appellant words to the effect of, "What are you looking for?"

55. On or about August 24, 1985, Respondents Johnson and Randall moved to positions directly in front of Appellant. While working at such positions, Randall put her arm around Johnson and

stated to Johnson words to the effect of, "It's too bad we're being watched all the time."

56. On or about September 7, 1985, Appellant took leave from work for medical disability, which disability consisted of severe psychological stress and anxiety resulting from Appellant's problems at the Wasatch Office. Said medical disability extended from September 7, 1985, to the date of Appellant's termination from AT&T on March 26, 1986.

57. During November of 1985, Appellant was advised by her psychiatrist that Appellant would be permanently unable to return to work at the Wasatch Office.

58. On or about March 12, 1986, Appellant received a telephone call from Douglas Erickson, who was then Group Manager of the Wasatch Office. Respondent Randall was also on the line throughout the ensuing conversation. Erickson informed Appellant during this conversation that inasmuch as Appellant would be medically incapable of continuing her employment at the Wasatch Office, Appellant would be required to transfer for work to Boise, Idaho, such transfer to be effective within ten (10) days from the date thereof, in order for Appellant to retain her employment with AT&T. During this conversation, Appellant responded to Erickson's statement by informing Erickson that it would be impossible for Appellant to transfer upon such short notice inasmuch as Appellant was then undergoing psychiatric treatment in Salt Lake City for the injuries which she had sustained through AT&T's harassment

against Appellant and inasmuch as Appellant's minor daughter was attending school in Salt Lake City, Utah. In response to these statements by Appellant, Randall stated words to the effect of, "What do you expect us to do, build you a new building?" Erickson responded to Appellant's statements by informing Appellant that Appellant's failure to report for work in Boise, Idaho, within ten days would result in Appellant's termination from AT&T.

59. On or about March 28, 1986, Appellant received a letter from Erickson dated March 26, 1986. In said letter, Erickson informed Appellant that inasmuch as Appellant had failed to report for work in Boise, Idaho, by March 23, 1986, appellant's employment with AT&T was terminated, effective March 26, 1986.

60. On April 5, 1989, Appellant commenced the present action by filing a civil Complaint in the Third Judicial District Court of Salt Lake County, State of Utah, Civil No. 890902183CV. Said Complaint alleged numerous claims under state law arising from Respondents' retaliatory harassment and discharge of Appellant. Respondents filed a Motion to Dismiss on June 1, 1989. On October 10, 1989, the District Court, per the Honorable J. Dennis Frederick, entered its Order on Respondents' Motion to Dismiss, treating said Motion as a Motion for Summary Judgment and dismissing Appellant's Verified Complaint on all counts.

ISSUES PRESENTED FOR REVIEW

I. ARE APPELLANT'S CLAIMS PRE-EMPTED BY THE EXCLUSIVE REMEDY PROVISION OF UTAH CODE ANNOTATED, SEC. 34-35-7.1(11) (1953, AS AMENDED)?

Respondents argued below that the Utah Anti-Discrimination Act pre-empts Appellant's common-law claims. Utah Code Annotated, Sec. 34-35-7.1(11) provides:

> The procedures contained in this section and Section 34-35-8 are the exclusive remedy under state law for employment discrimination because of race, color, sex, age, religion, national origin, or handicap.

Appellant submits that this provision specifically omits any reference to retaliation, thereby indicating that common-law claims arising from retaliatory discharge are not pre-empted. The Utah Legislature realized the distinction between retaliation and other forms of discrimination when it enacted the Anti-Discrimination Act, as evidenced by their inclusion of a specific definition of "retaliate". Utah Code Annotated, Section 34-35-2(15).

Further, the Act consistently treats retaliation and discrimination as distinct concepts. Utah Code Annotated, Section 34-35-6(1)(a)(i), (1)(e), (1)(f)(iii). Significantly, Title VII after which the Anti-Discrimination Act is patterned, specifically distinguishes between retaliation (42 U.S.C. Sec. 2000e-3) and other forms of discrimination (42 U.S.C. Sec. 2000e-2). Most importantly, the Utah Legislature has enacted multiple statutory

prohibitions against employer retaliation. Const. Utah, Art. III, Sec. 19 (Blacklisting); Utah Code Annotated, Sections 67-21-1, et. seq., (Whistleblowers Protection); Utah Code Annotated, Section 34-28-19 (Wage Claims); Utah Code Annotated, Section 34-22-12 (Wage and Hour Disputes). Hence, the Anti-Discrimination Act was not intended to be the exclusive remedy for employer retaliation.

II. ARE APPELLANT'S CLAIMS PRE-EMPTED BY GENERAL PRINCIPLES OF STATUTORY CONSTRUCTION?

Respondents argued below that, independent from the exclusive remedy provision of the Utah Anti-Discrimination Act, the Act should be construed as pre-empting all common-law claims arising in the context of employment discrimination pursuant to general principles of statutory construction. As the parties memoranda below indicated, the pre-emptive effect of state statutory remedies for employment discrimination where the statutory provisions contain no express exclusive remedy clause is a much-disputed issue in recent employment law. Compare Makovi v. The Sherwin-Williams Company, 561 At.2d 179 (MD, 1989) (common-law claims pre-empted); and McCool v. Park Royal Convalescent Center, 777 P.2d 1013 (Ore. App. 1989) (common-law claims not pre-empted). Appellant submits that this controversy is largely inapplicable in the present case because the Utah Anti-Discrimination Act specifically excludes retaliatory discharge from its exclusive remedy provision. The distinction made in the Utah Anti-Discrimination Act between retaliation and other forms of

discrimination reflects the distinction between discrimination based upon status and retaliation for the exercise of a legal right, which has been recognized in other jurisdictions. Makovi, supra, at 184; Holien v. Sears, Roebuck & Company, 689 P.2d 1292, (Ore., 1984) (Linde, J. concurring).

Assuming, arguendo, that it is necessary to apply general principles of statutory construction to determine the issue of pre-emption in the present case, Appellant submits that the opinions which have found no pre-emption are better reasoned and more sensitive to the problem of employment discrimination and the limited effectiveness of statutory remedies. For example, Rojo v. Kliger, 257 Cal.Rptr. 158 (Cal.App. 2 Dist., 1989). Further, there is no indication in the legislative history of the Utah Anti-Discrimination Act that the Act was intended as the exclusive remedy for retaliatory discharge. To the contrary, the Legislature has manifest its intent to provide multiple remedies for retaliation.

III. IS APPELLANT'S CLAIM FOR WRONGFUL DISCHARGE PRE-EMPTED BY THE COLLECTIVE BARGAINING AGREEMENT?

Respondents argued below that Utah should not recognize a common-law claim for wrongful discharge in violation of public policy where a collective bargaining agreement provides a contractual remedy to the employee. This argument has been rejected by the majority of the courts which have considered it. For example,

Peabody Galion v. Dollar, 666 F.2d 1309 (10th Cir., 1981); Lepore v. Natl. Tool & Mfg. Co., 540 A.2d 1296 (NJ Sup. 1988). The primary reason for rejecting Respondents' argument has been that state policy is independent and superior to any contractual arrangement of the parties. Moreover, it would be anomalous to provide a greater degree of protection to "at-will" employees than to employees under contract. In her majority opinion in Berube v. Fashion Centre, LTD, 104 UAR 4, 15 Note 10, Justice Durham implied that a cause of action for wrongful discharge would lie for both contractual and non-contractual employees. Further, the statutory prohibitions upon retaliatory discharge in the state of Utah apply equally to union and non-union employees. For example, Utah Code Annotated Section 34-35-6.

IV. ARE APPELLANT'S CLAIMS PRE-EMPTED BY FEDERAL LABOR LAW?

Respondents argued below that Appellant's claims are pre-empted by Section 301 of the Labor-Management Relations Act (29 USC, Sec. 185), which has been recognized as providing the exclusive remedy for breach of a collective bargaining agreement. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 85 L Ed. 2d 206 (1985). However only state law claims which are "inextricably intertwined" with an interpretation of a collective bargaining agreement are pre-empted. Allis-Chalmers, at 216. In general, state law claims for violation of public policy are not pre-empted, because they derive from rights which are wholly

independent and distinct from the collective bargaining agreement. Lingle v. Norge Div. of Magic Chef, Inc., 108 S.Ct. 1877 (1988). On their face, Appellant's state law claims in this case have nothing to do with the Collective Bargaining Agreement. At the least, an issue of fact is presented. Lingle, at 1882.

Appellant's Verified Complaint contains a claim for breach of implied contract. This claim arises from Respondent AT&T's "Code of Conduct" which Appellant was required to read and sign each year as a condition of her continued employment. The Code of Conduct contains an express prohibition upon retaliation and discrimination. It also sets forth a procedure to remedy such retaliation or discrimination (AT&T's "EEO Office"), which is completely distinct from any remedy contained in the Collective Bargaining Agreement. Thus, Appellant submits that Respondents breached their independent contractual duty to Appellant under the Code of Conduct. The existence of a Collective Bargaining Agreement does not preclude the existence of an independent employment contract for purposes of Sec. 301 pre-emption. Caterpillar, Inc., v. Williams, 96 L Ed.2d 318 (1987).

V. ARE APPELLANT'S CLAIMS FOR NEGLIGENT RETENTION, BREACH OF IMPLIED CONTRACT, AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BARRED BY LIMITATIONS?

The parties agreed below that the above-mentioned claims are subject to the four-year Statute of Limitations provided by Utah Code Annotated, Sec. 78-12-25(2). Respondents

asserted that because some of their tortious conduct occurred prior to the limitations period, those claims are barred by limitations. However, it is clear from Appellant's Affidavit that most, if not all, of Respondents' tortious acts occurred within the limitations period. This issue is at least one of fact.

VI. DID APPELLANT ALLEGE SUFFICIENT FACTS TO STATE A CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS?

Appellant submits that her Verified Complaint and Affidavit were more than sufficient to create an issue of fact upon this claim.

VII. DID APPELLANT STATE A CLAIM AGAINST THE INDIVIDUAL RESPONDENTS FOR MALICIOUS INTERFERENCE WITH CONTRACT?

Respondents raised two arguments below with respect to Appellant's claims for tortious interference: (1) With reference to Respondent Bateson-Hough, Respondents argued that as a management employee, Bateson-Hough was a party to any employment contract between Appellant and AT&T, and, therefore, could not interfere with the contract. (2) With reference to Respondents Johnson and Randall, Respondents argued that Appellant failed to state a claim because she did not allege that these Respondents "persuaded" or "conspired" with another to breach the contract which existed between Appellant and AT&T.

Appellant submits that a management employee can be guilty of tortious interference where he or she acts out of purely

personal motives, such as malice. Zappa v. Seiver, 706 P.2d 440, (CA App. 1985); Wagenseller v. Scottsdale Memorial Hospital, 710 P2d 1025 (Ariz. 1985). The existence of malice is an issue of fact.

With respect to the non-management employees, Appellant submits that her Verified Complaint and Affidavit are sufficient to create an issue of fact as to whether these Respondents conspired with or persuaded another to breach their contract with Appellant.

REASONS FOR SUPREME COURT REVIEW

This Appeal should be decided by the Utah Supreme Court for the following reasons:

1. No determinative Utah law exists concerning the scope of the public policy exception to at-will employment.

2. No determinative Utah law exists concerning the applicability of the Utah Anti-Discrimination Act's exclusive remedy provision to cases involving retaliatory discharge.

3. No determinative Utah law exists concerning a management employee's liability for malicious interference with contract.

AUTHORITIES

The following authorities are believed by Appellant to be determinative of certain issues raised in this Appeal:

Utah Code Annotated, Sec. 34-35-1, et. seq.

Berube v. Fashion Center LTD., 104 UAR 4 (1989);

Lingle v. Norge Div. of Magic Chef, Inc., 108 S.Ct. 1877 (1988).

DATED this 30th day of November, 1989.

Respectfully submitted,

PERKINS, SCHWOBE & McLACHLAN

Richard W. Perkins
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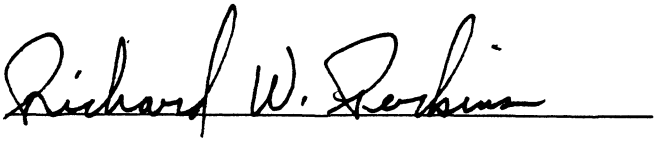
I hereby certify I mailed a true and correct copy of the foregoing Docketing Statement to Richard M. Hymas, Attorney for Respondents, at Suite 1100, Eagle Gate Plaza, 60 East South Temple, Salt Lake City, Utah 84147, postage prepaid, this 30th day of November, 1989.



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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

DEBRA S. RETHERFORD, Plaintiff, vs. AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.; CATHY BATESON; JOLENE GAILEY; LOUISE JOHNSON; VICKIE RANDALL; DOE I THROUGH DOE X, Defendants.	ORDER Civil No. 890902183CV Judge J. Dennis Frederick

Defendants' Motion to Dismiss having come before the Court for decision, and the Court having reviewed the memoranda and affidavits submitted by Plaintiff and Defendants, and the Court having determined that Defendants' Motion to Dismiss should be treated as a motion for summary judgment; and the Court having found that there are no genuine issues of material fact; and the Court having further determined that Defendants are entitled to judgment as a matter of law; now, therefore,

EXHIBIT "A"

IT IS ORDERED that Defendants' Motion to Dismiss, which is being treated as a motion for summary judgment, is hereby granted.

DATED this 10 day of October, 1989.

BY THE COURT:

/s/
Honorable J. Dennis Frederick
District Judge

CERTIFICATE OF SERVICE

I certify that on this 28th day of September, 1989, I served upon Plaintiff a true and correct copy of the foregoing ORDER, by mailing the same, postage prepaid, to the following:

Richard W. Perkins, Esq.
RICHARDS, SCHWOBE & McLACHLAN
343 South 400 East
Salt Lake City, Utah 84111

Richard M. Thomas

1822.AT827.JBS

PERKINS, SCHWOBE & McLACHLAN
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343 South 4th East
Salt Lake City, Utah 84111
Telephone: (801) 532-6808

Lahlean Parker

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-26053

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY,

STATE OF UTAH

* * * * * * * * *

DEBRA S. RETHERFORD, Plaintiff, vs. AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.; CATHY BATESON; LOUISE JOHNSON; VICKIE RANDALL; DOE I THROUGH DOE X, Defendants.	:	NOTICE OF APPEAL Civil No. 890902183CV Judge J. Dennis Frederick

* * * * * * * * *

COMES NOW the Plaintiff Debra S. Retherford, by and through her attorney of record, Richard W. Perkins, and hereby appeals to the Utah State Supreme Court the Order which was entered upon Defendants' Motion to Dismiss by the Third Judicial District Court in and for Salt Lake County, State of Utah, on October 10, 1989.

PERKINS, SCHWOBE & McLACHLAN

DATED: October 25, 1989

Richard W. Perkins
Attorney for Plaintiff
343 South 4th East
Salt Lake City, Utah 84111

EXHIBIT "B"

I hereby certify I mailed a true and correct copy of the foregoing Notice of appeal to Richard M. Hymas, Attorney for Defendants, at Post Office Box 11808, Salt Lake City, Utah 84147, postage prepaid, this 25 day of October, 1989.

Richard W. Jeschin